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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No._____

ALVA WALLACE
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To the Honorable the SUPREME COURT OF THE UNITED STATES:

The petition of Alva Wallace respectfully shows:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED

Petitioner seeks review of a decision by the United States Court of Appeals of the Eighth Circuit rendered April 19, 1949 affirming an order of the District Court of the United States for the District of South Dakota entered May 28, 1948 dismissing Petitioner's application to vacate a judgment of such District Court, entered April 22, 1943, by which judgment Petitioner was sentenced to twenty years imprisonment for alleged bank robbery.

In such petition for vacation of the judgment, Petitioner contended that:

(a) His constitutional rights were violated in that his conviction was based on proceedings whereby he was denied any opportunity to present witnesses to establish his defense.

(b) His constitutional rights were further violated in that at a vital stage of such proceedings he was without his consent deprived of assistance of counsel.

(c) He ws prevented by officers and agents of the United States from effecting his expressed purpose to appeal from the judgment.

On the filing of the application Respondent moved for dismissal thereof. This motion was granted in an order which recited in substance that the court records showed Petitioner's contentions untenable. With regard to Petitioner's claim that he was deprived of counsel. the order recited that this was "in direct contradiction of the recitals of the judgment and cannot therefore be considered."

Petitioner's notice of appeal was filed June 23, 1948. The Court of Appeals first denied an application by Petitioner for appointment of counsel, this on the ground the appeal was not timely. Thereafter, and following what amounted to a motion by Petitioner to reconsider this ruling, the Court on November 12, 1948 entered an order designating one of Petitioner's present counsel (Holton Davenport) to act in his behalf and reserved the jurisdictional question until final submission of the case.

As shown by the Court of Appeals opinion, it was concluded that because of circumstances stated, the Court "properly may assume jurisdiction and consider this case upon the merits." However, and on the merits, the Court of Appeals rejected Petitioner's stated contentions.

II.

BASIS FOR JURISDICTION

Jurisdiction of this Court is invoked under New Title 28, United States Code, Section 1254(1), New Title 18, United States Code, Section 3772, Rule 37(b) of Federal Rules of

Criminal Procedure, and Rule 38 of Rules of the Supreme Court of the United States.

As shown under "Reasons for Allowance of Writ," Petitioner believes that the decision of the Court of Appeals is in important respects in conflict with decisions of other Courts of Appeals, that such decision with reference to important questions of constitutional law is at variance with views indicated by decisions of this Court, and that the questions presented should be settled by a decision of this Court.

III.

QUESTIONS PRESENTED

The case presents the following questions:

First, Petitioner claims that his conviction was based on the form but not the substance of a trial, in that he was denied a reasonable opportunity to present his defense, thereby depriving him of his right to a fair trial under the Sixth Amendment to the Federal Constitution, and rendering the resulting judgment void. This presents the question whether what occurred was mere error, or whether it was jurisdictional.

Second, Petitioner further claims that if permitted, he could have established that at a vital stage of the trial court proceedings he was without assistance of counsel. The trial court and the Court of Appeals held that the trial court record was conclusive against this contention, and that regardless of the actual facts, the record could not be corrected. This presents the obviously important question whether such a record is final and conclusive, regardless of whether it is true.

Third, Petitioner claims that when convicted he desired in good faith to appeal, and sought to obtain counsel for that purpose, but was prevented from so doing by those in whose custody the judgment had placed him. The Court of Appeals ruled that as there was no claim that this was deliberate, it amounted only to a contention that circumstances beyond Petitioner's control prevented his filing timely notice of appeal. This presents the important question whether the right of appeal may be frustrated by those acting for the Govern-

ment, through authority of a court judgment, and the prisoner may thereby be deprived of his appeal right. Petitioner contends it is the duty of those acting for the Government to respect the rights of a prisoner, and that if they frustrate his appeal right, he is entitled to relief, whether the conduct was deliberate or otherwise.

IV.

REASONS FOR ALLOWING THE WRIT

Such reasons are elaborated in the accompanying brief. Summarized they are as follows:

1.

The decision of the Court of Appeals does not give to the constitutional rights of a defendant in a criminal prosecution the same broad construction that is indicated by decisions of this Court.

Moore vs. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Powell vs. Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55; *Patton vs. United States,* 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253; *Glasser vs. United States,* 315 U. S. 60, 86 L. Ed. 680 62 S. Ct. 457; *Cooke vs. United States,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390; *Chambers vs. State of Florida,* 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472; *Hawk vs. Olson,* 326 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 116.

The cited cases are to the effect that the trial contemplated by the Sixth Amendment to the Federal Constitution is a trial wherein the defendant has a fair opportunity to be heard and that this involves allowance of a reasonable time for preparation, with reasonably ample opportunity to present any defense. The cited cases further establish that if these rights are substantially infringed, a resulting conviction is void.

Here it fairly appears that up to five days before his trial Petitioner was warranted in relying in what amounted to assurances from the trial judge and clerk that witnesses vital to his defense, and whose testimony, if believed, would exonerate him, would be called at Government expense; that with this assurance then withdrawn, Petitioner was denied any opportunity to obtain the testimony of such witnesses and forced to immediate trial without benefit thereof, there-

by going through what was really only the form of a trial, without any real opportunity to be heard. It should be settled that a reasonable chance to present defense evidence is just as vital to due process as is the right to representation by counsel.

2.

A serious and important question of procedure should be determined. The trial court record recited that when judgment was pronounced, Petitioner appeared personally and by the same counsel to whom previous record references were made. By his application to vacate the judgment, Petitioner asserted this untrue—alleging the fact to be that two of the three attorneys to whom such reference was made, were not in the courtroom at all, and that the third of such attorneys did not and never had represented him, but represented his codefendant only. The trial court refused to hear evidence to substantiate this contention, this on the ground the record recitals were conclusive. The Court of Appeals took the same position.

The effect of such holding is that such a record recital is conclusive, whether it is correct or not. This is directly contrary to the holding of the Court of Appeals of the Ninth Circuit in *Wilfong vs. Johnston,* 156 Fed. (2d) 507. It also seems contrary to Rule 36 of the Federal Rules of Criminal Procedure, which specifically authorizes correction "at any time" of "clerical mistakes" and "errors in the record arising from oversight or omission." It is also apparently contrary to the modern rule to the effect that recitals in the court record are only presumptively correct. *Walker vs. Johnston,* 312 U. S. 275, 85 L. Ed. 830, 61 S. Ct. 574; *Hawk vs. Olson,* 326 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 116; *Johnston vs. Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.

Obviously, and as shown by the *Wilfong* case, there is a direct conflict in this respect in the positions respectively taken by the appellate courts in the Eighth and Ninth Circuits.

The question is important. Vital rights may, and frequently do, depend on a court record being accurate. In the present case twenty years of Petitioner's life was at stake. Judges, clerks and deputy clerks of courts are no more in-

fallible than other human beings. It is unthinkable that it is the law that simply because one of these makes a mistake in writing the record, that there is no power to correct the mistake, and this regardless of the disastrous consequences flowing therefrom.

3.

Another important question which should be decided by this Court is Petitioner's contention that he was frustrated by Government agents from effecting an appeal from the judgment of conviction. As was the case here, it is the present practice in criminal judgments to commit the defendant to the custody of the Attorney General for imprisonment. The Attorney General is the public officer charged with the duty of prosecuting criminal cases. Due to the praiseworthy objective of expediting criminal procedure, time for appeal is now sharply limited. While not a constitutional right, the right of appeal is, nevertheless, a valuable right—even more valuable to one in custody under a criminal charge than to the ordinary defeated litigant. Appellant was denied any opportunity to establish his contention that the Government agents having his custody would not permit him to see counsel to perfect an appeal, but hurried him to a federal prison with the time for appeal expiring before he was permitted to act. It should be established by a decision of this Court that agents in custody of a convicted defendant must respect his right of appeal.

WHEREFORE, Petitioner prays that a writ of certiorari issue from this Court to review the judgment rendered by the United States Court of Appeals of the Eighth Circuit, entered April 19, 1949, in the case of Alva Wallace, Appellant, vs. United States of America, Appellee, which case was numbered 13,801 on the docket of said Court of Appeals, and that said judgment of said Court of Appeals be reversed, and that Petitioner have such other and further relief as to this Honorable Court may seem meet and just.

GEORGE J. DANFORTH,
HOLTON DAVENPORT,
Sioux Falls, South Dakota,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No._____

ALVA WALLACE
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

At the time of preparation of this brief, the opinion of the United States Court of Appeals, review of which is sought, has not been published. The opinion as printed by such Court is included in the record certified to this Court.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

As shown by the accompanying Petition, jurisdicition of this Court is invoked under New Title 28, United States Code, Section 1254(1), New Title 18, United States Code, Section 3772, Rule 37(b) of Federal Rules of Criminal Procedure, and Rule 38 of Rules of the Supreme Court of the United States. As also shown by the accompanying Petition,

Petitioner asserts as reason for review that the opinion of the Court of Appeals decides important questions of federal law which should be settled by this Court, and that the decision of the Court of Appeals is at variance with views indicated by decisions of this Court; and further, that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals as to the important question of power to correct mistaken recitals in a district court record.

III.

STATEMENT OF CASE

The District Court record was not printed in the Court of Appeals, so there can here be no references to pages of any printed record of the District Court proceedings. Petitioner was indigent and after he had perfected his appeal, the Court of Appeals appointed one of his present counsel (Holton Davenport) to represent Petitioner, with provision that the District Court record need not be printed, and that the case be presened on the typewritten record certified by the Clerk of the District Court. Accordingly, the District Court record is certified to this Court in typewritten form.

However, and so far as possible to comply with the applicable rule, appropriate references are made to such record as it was certified to the Court of Appeals. This will render it later more convenient to substitute the pages of the printed record, if this is desired. Arabic numerals in parentheses will denote pages of such typewritten record to which references are made.

Petitioner was originally indicted in November of 1942 with one Roy L. Story for an alleged bank robbery at Turton, South Dakota, July 24, 1936, jurisdiction being predicated on an allegation that the bank deposits were insured by the Federal Deposit Insurance Corporation (108, 109). On this indictment and on a warrant of removal, Petitioner was taken into custody in Michigan, and on December 2, 1942, was delivered to the United States Marshal for the District of South Dakota (110-111). He remained in custody until his trial.

Apparently because the original indictment contained nothing to negative operation of the statute of limitations,

a new indictment was returned March 18, 1943, charging Petitioner and Story with the same offense, and also alleging that they became fugitives from justice after commission thereof (3-4). Petitioner was arraigned on this new indictmen April 20, 1943 (7), and so far as the record shows, this is the first he knew of it.

In the meantime and while Petitioner was in custody awaiting trial, he had correspondence with the Hon. A. Lee Wyman, the District Judge, and with Roy B. Marker, the Clerk of the District Court, with regard to subpoenaing defense witnesses. By letters dated April 13, 1943, both the Judge a nd Mr. Marker wrote Petitioner (24-26). These letters are printed in full in marginal notes in the Court of Appeals decision. As appears from Judge Wyman's letter, Petitioner had stated that the desired witnesses were in Michigan and Arkansas. The letters were to the effect that if it appeared the witnesses would testify to matter material to the defense, they would be subpoenaed by the District Attorney at government expense (24-26). Contemporaneously with this correspondence, Petitioner conferred for the first time with an attorney, J. W. Kaye (16-17). This application carried the title of the case, and was addressed to the Court (58-51). It was in the form of an affidavit by Petitioner and set forth in detail the names and residences of four prospective defense witnesses, three of whom were in Arkansas, and one in Michigan, and the testimony to be given by such witnesses, which was to the effect that Petitioner was in Arkansas and had business transactions there on July 23, 1936, and on July 26 or 27, 1936 (49-50).

On April 15, 1943, Mr. Kaye was informed by an Assistant United States District Attorney to the effect that the government would not subpoena the witnesses because they were more than one hundred miles from the place of trial (17).

Five days later Petitioner was arraigned on the new indictment (7), and presented an application for continuance, supported by his and Mr. Kaye's affidavits, the application being on the ground the continuance was necessary to obtain the defense testimony. By these affidavits there were presented in full the letters from the Judge and the Clerk, with detailed narrative of the testimony that would be given by the named witnesses, supporting, and in effect establishing,

the alibi defense (16-26). The record shows no refutation of the facts alleged and nothing to challenge Petitioner's good faith. However, the application was immediately denied by the Court, and Petitioner and his codefendant were forthwith placed on trial (27-28). Eleven witnesses were called by the prosecution (28-29). Appellant and his codefendant were the sole witnesses for the defence (30). On April 22 Petitioner and his codefendant were found "guilty as charged in the indictment" (31-32). Judgment was entered the same day committing Petitioner to "the custody of the Attorney General or his authorized representative for imprisonment for the period of twenty years" (33). Petitioner was first committed to a jail at Aberdeen, South Dakota, and five days later, on April 27, 1943, he was incarcerated in the United States Penitentiary at Leavenworth, Kansas (34).

As to Petitioner's representation at the trial by counsel, the record is to the effect that commencing with the arraignment and at all proceedings subsequent thereto, including the pronouncement of judgment, Petitioner and his codefendant appeared personally, and by their attorneys, J. W. Kaye, Vernon P. Williams and Lester T. Van Slyke (7, 27, 28, 29, 31, 33).

On November 18, 1947, Petitioner filed a motion to correct such record (37-40), this being obviously as foundation for application to vacate the judgment. The motion to correct the record set forth that Mr. Van Slyke did not participate in any of the proceedings subsequent to denial of the motion for continuance, leaving the courtroom immediately thereafter and not at any time returning (37-38); that Bernard M. Williamson (as later appears it is manifest that "Bernard M. Williamson" was at first shown of record as counsel, with the name Vernon P. Williams later substituted) did not participate at all (39); that Vernon P. Williams represented Story only and not Petitioner (39); and that Mr. Kaye was not present when the verdict was returned or when judgment was pronounced (38). The prayer was that the record be corrected accordingly.

This motion was denied ex parte, apparently without hearing or notice to Petitioner (52-53). The order recited that Mr. Van Slyke had appeared at the time of the arraignment and that there was no formal record showing the withdrawal of

said attorney; further, that the trial proceedings had previously been "corrected by substituting the name of Vernon P. Williams as attorney representing the defendants in all of the cases where the name of Bernard M. Williamson appeared," and further, that "said Attorney Vernon P. Williams appeared throughout the trial as attorney for both of the defendants in the above entitled action and that Attorney Vernon P. Williams was present in the Court Room at the time said verdict was returned" (52-53).

Also, on November 18, 1947, Petitioner filed an application which set forth that his original application that the witnesses be subpoenaed at government expense had been retained by the District Attorney's office, and asking that the same be ordered incorporated into the court record (42-44). On this application the District Court ordered that such application be delivered from the District Attorney's office to the Clerk, the order containing a recital that the application had been denied (46-47).

The present motion to vacate the judgment was filed February 13, 1948 (54-95). Among other things it set forth that Petitioner was without representation by counsel when the verdict was returned and judgment pronounced; that Mr. Van Slyke had had no connection with the case except that he had agreed to represent Petitioner if a continuance could be obtained, and upon denial of the continuance left the courtroom and did not return (70, 84); that without Petitioner's knowledge or consent Mr. Kaye was not present when the jury verdict was returned and judgment pronounced April 22, 1943, having left the previous day for his home in another city (84); that Vernon P. Williams represented Petitioner's codefendant only and not Petitioner (85-86); that contrary to the Sixth Amendment to the Constitution of the United States, Petitioner had been denied testimony of the witnesses supporting his alibi defense (78-80, 80-82); that by acts of government officers, Petitioner was precluded from effecting his expressed purpose of an appeal from the judgment (88-90); that immediately after the judgment was pronounced, Petitioner was "hustled back to the county jail at Aberdeen, South Dakota," where he tried to call an attorney, but was told the attorney was out of town (89); that the following day, April 23, 1943, he re-

newed this attempt and was told by the officer who had his custody that the attorney "would be right over," but that in less than thirty minutes "the United States Marshal and his deputies took Petitioner out of Aberdeen, South Dakota" (89), with the next stop at the county jail at Sioux Falls, South Dakota (89); that the next day, April 24, 1943, Petitioner asked the jailer to call an attorney for him, but was told that the jailer had orders not to permit Petitioner to see any attorney other than Mr. Kaye (89); that Petitioner sought to telephone the United States Marshal, but was told the Marshal would be at the jail the following day when Petitioner could see him (89-90); that early Monday morning, April 26, 1943, Petitioner was taken by government officers to the county jail at St. Joseph, Missouri, and the following day was delivered to the Leavenworth Penitentiary, where he was held in quarantine for almost six weeks (90); that he was then informed by an attorney that it was too late for an appeal and on correspondence with Judge Wyman told that the Judge knew of no way an appeal could be taken (90).

Also filed by Petitioner on February 13, 1948, was a petition for the production of material witnesses to establish his contentions (96-98), and an application for a writ of habeas corpus ad testificandum for his own production before the Court as a witness (100-101).

Respondent moved for dismissal of the motion to vacate (104). Petitioner was not present, but according to the record was "represented by Henry C. Mundt designated by the Court for that purpose" (104). Nothing appears in the record to indicate Petitioner requested such designation of counsel or had any notice of the motion to dismiss, or of the hearing thereon.

On May 28, 1948, the Court entered an order which dismissed the motion to vacate, the motion for production of witnesses, and the application for habeas corpus ad testificandum (105-106). So far as concerns the claim that Petitioner was deprived of counsel at the time of the receipt of the verdict and at the time of sentence, the order recited this was "in direct contradiction of the recitals of the judgment and cannot therefore be considered" (105-106).

On Petitioner's appeal, the Court of Appeals held in substance that the motion for continuance was addressed to the discretion of the District Court and that if there was abuse of discretion in refusing a continuance, it did not constitute a denial of due process and was nothing more than error; that with regard to the claim that Petitioner was not represented by counsel when the verdict was returned and judgment pronounced, this was contrary to the court record, and that Petitioner "was not entitled, on his motion to vacate sentence, to offer testimony to contradict this record"; that as to the claim that Petitioner was prevented by government agents from perfecting an appeal, there was no contention that those who had him in charge deliberately obstructed such efforts, that the most that could be said was that Petitioner claimed circumstances beyond his control prevented his filing a timely notice of appeal, and that in any event the record was insufficient for any review of the proceedings had at the trial. On this basis the District Court order was affirmed.

IV.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in holding and deciding that in the circumstances here shown the District Court had jurisdicition to place Petitioner on trial without reasonable opportunity to present testimony to establish his defense, the denial of such reasonable opportunity constituting a violation of Petitioner's right to a fair trial provided by the Sixth Amendment to the Constitution of the United Staes.

2. The Court of Appeals erred in holding that Petitioner could not introduce evidence in the District Court to correct the record recitals with regard to his representation by counsel, and thereby show that he was in fact deprived of his constitutional right to assistance of counsel upon return of the verdict and pronouncement of judgment.

3. The Court of Appeals erred in holding in effect that Petitioner's application to vacate the judgment did not disclose adequate ground for such action on the basis that by acts of government agents Petitioner had been prevented from effecting his expressed purpose of an appeal from such judgment.

V.

ARGUMENT

Petitioner's argument will develop the following points:

Point 1. Petiotioner's conviction was without a reasonable opportunity to present his defense, and, accordingly, violated his rights under the Sixth Amendment to the Federal Constitution.

Point 2. Petitioner should have been permitted to show the actual facts with regard to his representation by counsel.

Point 3. If in fact frustrated by government agents from perfecting an appeal, Petitioner was enttiled to relief on his application to vacate the judgment.

These points will be developed in the order stated.

Point 1.

PETITIONER'S CONVICTION WAS WITHOUT A REASONABLE OPPORTUNITY TO PRESENT HIS DEFENSE, AND, ACCORDINGLY, VIOLATED HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION.

By decisions in recent years, this Court has established that the Sixth Amendment to the Federal Constitution contemplates a trial in a criminal prosecution in which the defendant has a fair opportunity to prepare his defense, a reasonable chance to obtain and present the evidence in his favor, all with the assistance of counsel at every stage of the proceedings.

Moore vs. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Powell vs. Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55; *Patton vs. United States*, 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253; *Glasser vs. United States*, 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *Cooke vs. United States*, 267 U. S. 517, 69 L. Ed. 767, 45 St. Ct. 390; *Chambers vs. State of Florida*, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472; *Hawk vs. Olson*, 326 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 116.

While these rights may be waived,the courts "indulge

every reasonable presumption against waiver" and never "presume acquiescence in the loss of fundamental rights." *Johnson vs. Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, quoting from *Ohio Bell Telephone Co. vs. Public Utilities Commission,* 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

Here the situation so developed that Petitioner simply did not have a fair chance to obtain and present the evidence in his favor.

He was indigent. By letters from the Judge and Clerk of the District Court, he was led to believe that his defense witnesses would be summoned at government expense. This assurance was withdrawn only five days before he went on trial. As it turned out, twenty years of his life hung in balance. By motion for continuance he sought a reasonable chance to make his defense. This was denied him. He, accordingly, went to trial virtually hopeless. Without his witnesses, conviction was a practical certainty, and the trial little more than a matter of form.

The Court of Appeals intimates the Petitioner himself was at fault for his predicament in that he had known for several months he was to go to trial for the bank robbery and had done nothing about getting the testimony. This is no answer. He had been arrested in Michigan, brought to South Dakota, and was in jail obviously without contact with friends. The witnesses were in distant localities, and he was restricted in his efforts to find and contact them. Contemporaneously with his letters to the Judge and Clerk, he had apparently for the first time had assistance of counsel. When in effect assured that the witnesses would be called at government expense, there was no reason for him to do anything more. With this assurance retracted only five days before trial, and in his indigent condition, there was clearly nothing he could do.

His affidavit for continuance set forth that if granted a continuance he would be able to arrange the presence of the desired witnesses.

The minimum consideration to which he was entitled was to have been allowed the limited time necessary to proceed under 28 U. S. C. A. 644 with a dedimus potestatem to take the depositions of the witnesses. This statute applied to crim-

inal as well as civil cases. *Clymer vs. United States* (C. C. A. 10th), 38 Fed. (2d) 581; *Wong Yim vs. United States* (C. C. A. 9th), 118 Fed. (2d) 667. As appears by the footnote under Rule 15(a) of the new Federal Rules of Criminal Procedure, as set forth in 18 U. S. C. A., this rule simply continues the old practice under the cited statute for depositions in behalf of the defendant in criminal cases.

The Court of Appeals attempts to answer this by stating that Petitioner did not ask for such relief. Again, this is no answer. Petitioner did ask for opportunity to produce the evidence to support his defense. To that end his request was for continuance. If not entitled to all the relief he requested, he was entitled to such relief as would give him the benefit of this vital testimony. It could have been done by granting him a relatively few days delay sufficient to go ahead with a dedimus potestatem.

The Court of Appeals further held that under 28 U. S. C. A. 656 the Court could not grant Petitioner's application that the witnesses be summoned at government expense. It is true that the cited statute had application only to witnesses within the district or within one hundred miles of the place of trial.

However, and at Page 43 of our brief in the Court of Appeals, we raised the question as to the validity of any such limitation. Under the reasoning of the cited decisions with reference to assistance of counsel, such a limitation could not stand.

These cases hold that the right to assistance of counsel means more than such a right if the defendant can pay for counsel. It is held that where the defendant himself is financially unable to employ counsel, it is mandatory on the court to see to it that counsel be appointed and act. The right to present defense evidence is more vital than the right to counsel. Counsel would usually be of little avail if presence of witnesses could not be obtained. It follows that the guarantee of "compulsory process for obtaining witnesses" goes farther than to permit subpoenas, with the defendant helpless if unable to pay the cost of bringing the witnesses to the place of trial.

The injustice of limiting the right is illustrated by the present record. The government could and did call all of the witnesses it desired to convict Petitioner, with Petitioner left to rely on his own testimony and that of his codefendant.

It is significant that when this Court revamped 28 U. S. C. A. 656 into Rule 17(a) of the Federal Rules of Criminal Procedure, there was deleted the limitation as to the witnesses being in the district or within one hundred miles of the place of trial. This is significant of a view that the limitation was inconsistent with the constitutional guarantee. It accords with the spirit of the recent decisions.

The Court of Appeals decision indicates that the request for calling the witnesses at government expense was simply for an informal arrangement to that effect. This was not the spirit and effect of what was done. The application was formal. It contained the title of the case and was addressed to the Court (48-51). At the Judge's suggestion it was taken up with the District Attorney (25-26). The District Attorney retained the application, but the Court later sustained Petitioner's position that it was fairly a part of the record and ordered it incorporated in the record (42-44, 46). The order recited that the application had been denied (42-46). Clearly, and by authority of the Court, Petitioner did present an application that the witnesses be subpoenaed at government expense with what amounted to denial by the Court of the application.

It is no answer to state, as did the Court of Appeals, that the matter was discretionary with the District Court, and that any abuse of the discretion was at most only error. Most of the cited cases deal with situations which are discretionary. If the abuse reaches the point where a defendant is denied his constitutional rights, then the matter is jurisdictional.

It should be settled by a decision of this Court that when as here a defendant is deprived of any reasonable chance to present his defense, the trial is not such as required by the Sixth Amendment.

Point 2.

PETITIONER SHOULD HAVE BEEN PERMITTED TO SHOW THE ACTUAL FACTS WITH REGARD TO HIS REPRESENTATION BY COUNSEL.

The applicable facts are reviewed under our Statement of the Case. In connection with this application, Petitioner was refused an opportunity to prove that the court record was erroneous, that of the three counsel alleged to be present representing Petitioner when the verdict was returned and judgment pronounced, two were not there at all, and that the third did not and never had represented Petitioner.

The Court of Appeals holds that Petitioner could not be heard to contradict the record in this respect. The Court of Appeals of the Ninth Circuit holds directly to the contrary. *Wilfong vs. Johnston*, 156 Fed. (2d) 507. Other decisions indicate the Court of Appeals was wrong. *Walker vs. Johnston*, 312 U. S. 275, 85 L. Ed. 830, 61 S. Ct. 574; *Hawk vs. Olson*, 326 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 116; *Johnson vs. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.

This is important. If the view of the Court of Appeals is erroneous, as it clearly seems to be, a decision of this Court is necessary to correct this error.

By Section 2255 of New Title 28 of the United States Code, habeas corpus is largely superseded by a motion such as this to vacate a judgment. It is unnecessary to expound the importance of habeas corpus. It is the historical remedy for relief from illegal imprisonment.

With a motion to vacate a judgment largely replacing habeas corpus, it is unthinkable that one alleging his imprisonment illegal cannot obtain correction of an erroneous court record. It amounts to a holding that even though on the actual facts imprisonment is illegal, the prisoner is deprived of relief simply because the court is powerless to correct the mistakes of its clerk in writing the record.

The decisions are clearly to the effect that if Petitioner was without the assistance of counsel when the verdict was returned and judgment pronounced, such judgment is void.

Such is the effect of the cases already cited under this point.

Petitioner should, of course, have been permitted an opportunity to establish that the facts were as he claimed.

Point 3.

IF IN FACT FRUSTRATED BY GOVERNMENT AGENTS FROM PERFECTING AN APPEAL, PETITIONER WAS ENTITLED TO RELIEF ON HIS APPLICATION TO VACATE THE JUDGMENT.

The facts are summarized under our Statement. Petitioner claimed that after his conviction he sought to obtain counsel to perfect an appeal, and made this request known to those in whose custody he had been placed, but was hurried from place to place until incarcerated in the penitentiary and quarantined until too late for an appeal.

It is true that the right of appeal is only statutory. Nevertheless it is a valuable right. It would be an incongruity to develop a system whereby such right of appeal would be had by one class of citizens and in effect denied to another class of citizens. To that effect see Justice Rutledge's opinion in *Boykin vs. Huff*, 121 Fed. (2d) 865.

With the present practice of committing sentenced defendants to the custody of the Attorney General, and with the Attorney General the chief law enforcement officer of the nation, and with the limited time allowed for appeal, the opportunity for abuse is manifest. Unless the rule is such that the Attorney General and his subordinates must respect this right, abuse would be inevitable.

Acting as an arm and agency of the court, taking custody of the imprisoned defendant, the Attorney General and his assistants must not be permitted to do that which prevents the defendant from taking an appeal, regardless of whether their conduct is deliberate or otherwise.

If the facts were as Petitioner claimed, he was at least entitled to reinstatement of his right of appeal, to the end that he would lose nothing by that which had been done by

subordinates of the Attorney General, acting under the court judgment.

This is also important and requires a decision by this Court to make the rule clear.

VI.

CONCLUSION

For all of the reasons which have been advanced, it is respectfully urged that the Court of Appeals decision should be reviewed on writ of certorari and reversed.

GEORGE J. DANFORTH,
HOLTON DAVENPORT,
Sioux Falls, South Dakota,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No._____

ROY L. STORY
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To the Honorable the SUPREME COURT OF THE UNITED STATES:

The petition of Roy L. Story respectfully shows:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED

This is somewhat of a companion case to Alva Wallace, Petitioner, vs. United States of America, Respondent, in which there is filed herewith a Petition for Certiorari. Accordingly, reference is made to the petition and supporting brief in the Wallace case, and repetition will be avoided as far as may be.

Petitioner was indicted and convicted with Wallace, with the same offense alleged. By the judgment of the District

Court for the District of South Dakota, entered April 22, 1943, Petitioner was sentenced to twenty years imprisonment. Like Wallace, he applied to such Court for vacation of the judgment. This was denied by order of such Court entered July 8, 1948. On appeal such order was affirmed by the Court of Appeals decision rendered April 19, 1949. This petition prays for review on certiorari.

In his petition and amended petition for vacation of the judgment, Petitioner alleged in substance that his constitutional rights were violated in that his conviction was based on proceedings whereby he was denied any opportunity to present witnesses to establish his defense, his contention in this respect being substantially the same as that advanced by Wallace.

In the Court of Appeals opinion appears the statement: "It is not certain that Story took his appeal in time, but we shall assume that he gave adequate written notice of his intention to appeal within ten days from the date the order was entered, and that we are not without jurisdiction." In view of this expressed doubt, the situation as to the appeal will be briefly summarized.

After the appeal had been attempted, and Petitioner had applied to the appellate court for appointment of counsel, such application was overruled on the ground the appeal was not timely. Thereafter, and following what amounted to a motion for reconsideration, the Court on November 12, 1948, entered an order designating one of Petitioner's present counsel (Holton Davenport) to act in Petitioner's behalf and reserved the jurisdictional question until final submission of the case. As already stated, Petitioner's application to vacate the judgment was denied by the District Court by order entered July 8, 1948. The notice of appeal was not actually filed until August 4, 1948. However, and in support of the jurisdiction of the Court of Appeals, Petitioner presented affidavits which were not disputed, and which established the situation as hereinafter set forth.

On May 26, 1948, Petitioner wrote to Roy B. Marker, the Clerk of the District Court, stating that if his application was denied, he would pay for preparation of transcript, etc.,

and: "I want both indictments and all the records sent to the 8th Circuit Court."

This letter was in the Clerk's possession by June 2, 1948, as shown by his letter, acknowledging the receipt thereof.

On July 15, 1948 (only seven days after the filing of the order in question), Petitioner wrote the Clerk forwarding a notice of appeal, which letter was on July 15, 1948, delivered to the proper officer or employee of the United States Penitentiary at Leavenworth, Kansas, charged with the duty of mailing such letter.

In this notice of appeal there was some confusion as to the date of the order from which the appeal was taken, this stemming from lack of information on the part of Petitioner as to what had occurred, he not being present. This confusion resulted from the fact that the District Court had on May 26, 1948, entered an order denying the original application to vacate, and had then in effect reopened the matter on an amended application prepared and filed by counsel appointed by the District Court to represent Petitioner. As shown by the correspondence, Petitioner specified this first date, May 26, 1948, as the date of the order from which he was appealing, but then forwarded a revised notice of appeal correcting the inaccuracy.

It was and is Petitioner's contention that his letter of May 26, 1948, was in itself a sufficient notice of appeal; that this was supplemented and confirmed by what Petitioner did on July 15, 1948, when he delivered to those in whose custody he had been placed, for filing with the Clerk, a notice of appeal which adequately described the order, the mistaken date being an immaterial inaccuracy; that this was within ten days from the entry of the questioned order and that whereunder a court judgment a defendant in a criminal prosecution is placed in the custody of the Attorney General and his subordinates as an agency or arm of the Court, that delivery to such agency of the Court for transmission to the Clerk must be deemed a sufficient filing of the notice of appeal, this being all that can possibly be done by a prisoner in such situation. See *Boykin vs. Huff* (App. D. C.), 121 Fed. (2d) 865; *Remine vs. United States* (C. C. A. 6th), 161 Fed.

(2d) 1020; *Oddo vs. United States* (C. C. A. 2nd), 171 Fed. (2d) 854.

II.

BASIS FOR JURISDICTION

Jurisdiction of this Court is invoked under New Title 28, United States Code, Section 1254(1), New Title 18, United States Code, Section 3772, Rule 37(b) of Federal Rules of Criminal Procedure, and Rule 38 of Rules of the Supreme Court of the United States.

Petitioner believes the decision of the Court of Appeals at variance with views indicated by decisions of this Court and by decisions of other United States Courts of Appeals, and that the question presented should be settled by a decision of this Court.

III.

QUESTION PRESENTED

The case presents the following question:

> Petitioner claims that his conviction was based on the form but not the substance of a trial, in that he was denied a reasonable opportunity to present his defense, thereby depriving him of his right to a fair trial under the Sixth Amendment to the Federal Constitution, and rendering the resulting judgment void. This presents the question whether what occurred was mere error, or whether it was jurisdictional.

IV.

REASONS FOR ALLOWING THE WRIT

Such reasons are elaborated in the accompanying brief. Summarized they are as follows:

In *Moore vs. Dempsey,* 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Powell vs. Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55; *Patton vs. United States,* 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253; *Glasser vs. United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *Cooke vs. United States,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390; *Chambers vs. State of Florida,* 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472, and *Hawk*

vs. Olson, 326 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 116 this Court has held in substance that in a criminal case the trial contemplated by the Sixth Amendment to the United States Constitution is a trial wherein the defendant has a fair opportunity to be heard and that this involves allowance of a reasonable time for preparation, with reasonably ample opportunity to present any defense. It is further established by these cases that if these requirements are not substantially met, a resulting conviction is void.

The record here shows that up to five days before the trial Petitioner relied on what amounted to assurances from the District Judge and Clerk that a witness vital to his defense, and whose testimony, if believed, would exonerate him, would be called at government expense; that such assurance continued until five days before the trial, when it was withdrawn, with Petitioner then denied any opportunity to obtain the testimony in question, and forced to immediate trial without benefit thereof.

Petitioner submits that it should be finally settled by a decision of this Court that a reasonable opportunity to present defense evidence is vital to due process of law. Petitioner further believes that in this respect the Court of Appeals decision is contrary to the spirit of decisions by other Courts of Appeals, including *Boykin vs. Huff* (App. D. C.), 121 Fed. (2d) 865, *Remine vs. United States* (C. C. A. 6th), 161 Fed. (2d) 1020, and *Wilfong vs. Johnston* (C. C. A. 9th), 156 Fed. (2d) 507.

WHEREFORE, Petitioner prays that a writ of certiorari issue from this Court to review the judgment rendered by the United States Court of Appeals of the Eighth Circuit, entered April 19, 1949, in the case of Roy L. Story, Appellant, vs. United States of America, Appellee, which case was numbered 13,822 on the docket of said Court of Appeals, and that said judgment of said Court of Appeals be reversed, and that Petitioner have such other and further relief as to this Honorable Court may seem meet and just.

GEORGE J. DANFORTH,
HOLTON DAVENPORT,
Sioux Falls, South Dakota,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No._____

ROY L. STORY
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

At the time of preparation of this brief, the opinion of the United States Court of Appeals, review of which is sought, has not been published. The opinion as printed by such Court is included in the record certified to this Court.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

As shown by the accompanying Petition, jurisdiction of this Court is invoked under New Title 28, United States Code, Section 1254(1), New Title 18, United States Code, Section 3772, Rule 37(b) of Federal Rules of Criminal Procedure, and Rule 38 of Rules of the Supreme Court of the United States.

Petitioner contends the public interest requires the review on certiorari in that the opinion of the Court of Appeals decides important questions of federal law which should be settled by this Court; that the decision of the Court of Appeals is at variance with views indicated by decisions of this Court, and contrary to the spirit of decisions by other Courts of Appeals.

III.

STATEMENT OF CASE

The District Court record was not printed in the Court of Appeals, so there can here be no references to pages of any printed record of the District Court proceedings. Petitioner was indigent and after he had perfected his appeal, the Court of Appeals appointed one of his present counsel (Holton Davenport) to represent Petitioner, with provision that the District Court record need not be printed, and that the case be presented on the typewritten record certified by the Clerk of the District Court. Accordingly, the District Court record is certified to this Court in typewritten form.

However, and so far as possible to comply with the applicable rule, appropriate references are made to such record as it was certified to the Court of Appeals. This will render it later more convenient to substitute the pages of the printed record, if this is desired.

The record is somewhat confusing. After the Court of Appeals had appointed counsel to act for Petitioner, it developed that an adequate record had not been certified to the Court of Appeals. This was largely solved by a stipulation with Respondent to the effect that so far as applicable all material in the record in the Wallace case would be deemed before the Court in the Story case. In addition, the stipulation placed before the Court of Appeals an application by Petitioner, prior to his trial, which application asked for compulsory process for designated witnesses, but which was held in the District Attorney's files until ordered by the District Court to be incorporated in the record, the situation with regard to such application being similar to that presented in the Wallace case and reviewed in the Statement of the Case therein.

Accordingly, and before the Court of Appeals in the present case was the District Court record as certified therein, and also the record certified in the Wallace case. To distinguish between the two, Arabic numerals in parentheses will refer to such record in the District Court as certified in the present case, while references to the record in the Wallace case will also be by Arabic numerals, but will be preceded by "W."

As indicated by the foregoing, it will simplify consideration of this case if there are first read the petition and accompanying brief in the Wallace case. This brief will supplement the Wallace brief, and will be mainly devoted to treatment of matters whereby this case is distinguished from the Wallace case.

So far as concerns the original indictment, the later and new indictment, the arraignment, the application for continuance, the denial of the application, commencement of trial the same day as the arraignment, the trial and the verdict, the narrative thereof in the Wallace brief here applies. Reference is particularly made to the Wallace brief for the correspondence between Wallace, the District Judge and the District Clerk. Such correspondence was in behalf of Petitioner as well as in behalf of Wallace. This is shown by the affidavit of Wallace and Petitioner on the application for continuance wherein it is stated that Wallace wrote "on behalf of both defendants" (W 22).

Petitioner's application for witnesses was similar in form to that made in behalf of Wallace and reviewed in the Wallace brief. Such application by Petitioner set forth that he was indigent, that by reason thereof it was impossible for him to procure the attendance at his trial of a witness, Claude Spencer, residing at Rio Vista, California, who had been in business at Diaz, Arkansas, with Petitioner in July of 1936, and who would be able to testify to the joint ownership of such business by him and Petitioner and that Petitioner was at the place of business every night during July of 1936 and that such witness was in Petitioner's company every day and evening during such month. The prayer was that "an order be issued out of this Court directing the Clerk thereof to issue Subpoena for the witness named above," and "that

his attendance be compelled at the trial of this defendant on said charge . . ." (As already stated, this application was not a part of the District Court record certified to the Court of Appeals, but was later brought to the Court of Appeals on the indicating stipulation. Accordingly, the page reference is not given, it not being a part of such District Court record and not yet printed as part of the record.)

As in the Wallace case, the District Court judgment was entered April 22, 1943, and committed Petitioner to the custody of the Attorney General for twenty years imprisonment.

As already stated, Petitioner joined with Wallace in the application for continuance made April 20, 1943, five days after Petitioner's counsel had been notified of withdrawal of the assurance that the desired witnesses would be subpoenaed at government expense. The application set forth the expected testimony of the witness Spencer, substantially the same as in the previous application just reviewed, and that if granted a continuance, Petitioner could arrange to procure the testimony (W 20-23). The affidavit was not refuted, but the motion was denied by the Court, and Petitioner was forced to go to trial the same day (W 27-28). He and Wallace were the only witnesses in his own behalf and eleven witnesses were called for the prosecution (W 27-29). The verdict of guilty was returned April 22, 1943, and the judgment was entered the same day (W 31-33). The facts as to the appeal are summarized in the accompanying Petition.

IV.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in holding and deciding that in the circumstances here shown the District Court had jurisdiction to place Petitioner on trial without reasonable opportunity to present testimony to establish his defense, the denial of such reasonable opportunity constituting a violation of Petitioner's right to a fair trial provided by the Sixth Amendment to the Constitution of the United States.

V.

ARGUMENT

Petitioner contends his conviction was without a reasonable opportunity to present his case, and, accordingly, violated his rights under the Sixth Amendment to the Federal Constitution. The following cases are cited:

Moore vs. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Powell vs. Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55; *Patton vs. United States,* 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253; *Glasser vs. United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *Cooke vs. United States,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390; *Chambers vs. State of Florida,* 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472; *Hawk vs. Olson,* 326 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 116; *Boykin vs. Huff* (App. D. C.), 121 Fed. (2d) 865; *Remine vs. United States* (C. C. A. 6th), 161 Fed. (2d) 1020; *Wilfong vs. Johnston* (C. C. A. 9th), 156 Fed. (2d) 507.

What is stated in the Wallace brief under the analogous point is here applicable. To avoid repetition, reference is made thereto. The procedure simply did not square with due process of law. Petitioner was convicted and imprisoned without a fair opportunity to be heard. Without the supporting testimony, his trial was only a formality.

It is respectfully urged that the Court of Appeals decision should be reviewed and reversed.

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Counsel for Petitioner.